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Statutory Charters for
Intelligence Organizations and Functions

I. Identification of Issues

The major organizations, responsibilities, and functions of the Intelligence Community - with few exceptions - are not derived from statute; they are largely based on broad executive authority of the President for the conduct of foreign affairs and the command of the armed services, and - to some extent - on the broad authorities of the Director of Central Intelligence (DCI) and the Secretary of Defense to conduct the operation of their agencies.

Only the correlation/evaluation (or production) and coordination functions of the DCI/CIA are specifically recognized in statute; there are no similar statutory provisions for the conduct of overhead reconnaissance, clandestine human source collection, counterintelligence, electronic intercept, or covert action. In terms of organization, only CIA has a specific statutory basis; there are no specific statutes establishing the National Security Agency (NSA), the Defense Intelligence Agency (DIA), the National Reconnaissance Office (NRO), the FBI, the Service Cryptologic Agencies (SCAs), or other Service military intelligence entities. Some of the functional and organizational arrangements are recognized in NSC intelligence directives, other Presidential directives, DCI directives, DOD directives, or Service or JCS directives; some - the NRO, for

example - rest on no formal directive, but on informal, written interagency agreements. Almost all of these directives/memoranda are, of course, classified to such an extent that they are unavailable to the public at large, have only recently been provided to some members of Congress, and are available to only a small circle in the Executive Branch. Some of the organizational and functional arrangements were subsequently recognized in specific legislation (NSA, FBI, and DIA), and most are informally recognized through an unwritten appropriations process.

The absence of statutory or administrative documents regarding these organizations, their functions, and the responsibilities gives rise to three major legal/policy issues:

(1) Would specific or more explicit public recognition - in statute, executive order, or other document - of the functions and organizations improve their activities or at least make them more respectable in the public eye?

(2) Should this official and public recognition include prohibitions or limitations on the activities of these organizations that would provide a greater degree of public confidence in their lawfulness?

(3) Would a variety of critical functions now performed by the Intelligence Community (such as covert action, electronic intercept, counterintelligence, protection of sources and methods, etc.) be more defensible

legally and politically, arouse less suspicion, and be more effectively performed if officially and publicly recognized?

Since the more specific functions mentioned in #3 above are addressed in separate papers in detail, no specific effort is made to cover them further in this paper.

II. Factual Background and Legal Discussion

A. Present System of Organizational and Functional Assignments and Limitations

The specific statutes dealing with the organization and the functions of the Intelligence Community are (1) the National Security Act of 1947 (50 U.S.C. 403) and (2) the Central Intelligence Agency Act of 1949 (50 U.S.C. 403a-j). These statutes serve as the organic acts by which the CIA was established and is currently administered. There are no similar statutes for any other intelligence agency, and the basis for their creation and current operations is heavily dependent on the broad executive responsibility of (1) the President for the conduct of foreign affairs, as head of the National Security Council, and as Commander in Chief; (2) the DCI in his role as coordinator of the intelligence activities; (3) the Secretary of Defense as head of the Department of Defense; and (4) the separate Military Departments, the Attorney General, and other department or agency heads.

The major current organizational/functional assignments and their legal basis are as follows:

(1) DCI/CIA - The statutes noted above provide specifically for the CIA functions of advising the NSC on intelligence matters, coordinating intelligence activities, and correlating and evaluating intelligence; in addition, these statutes provide that CIA will perform "such additional services of common concern" and "such other functions and duties related to intelligence" as the NSC directs. In a series of specific classified issuances (NSC intelligence directives), the NSC has directed DCI/CIA to assume, among other duties, certain responsibilities for coordinating production, establishing requirements, conducting clandestine human source collection, interpreting photography, and accomplishing some overt collection both overseas and in the U.S. Certain other current CIA functions - for example, satellite collection, communication support operations, and covert action - are not specifically covered in this series of directives, but have been established and conducted by CIA under less formal Presidential/NSC issuances and the broad authorities implicit in the 1947 and 1949 acts.

The 1947 statute also provides specific limitation on the intelligence activities of CIA, namely that CIA has "no police, subpoena, law enforcement, or internal security functions."

(2) NSA - NSA's current intelligence functions - intercept and processing of foreign communications - were assigned by

Presidential memorandum in 1952 and reflected in an NSC intelligence directive at that time. Although the use of NSC intelligence directives (NSCIDs) had previously been used primarily to assign functions to an existing organization (CIA), this NSCID directed the Secretary of Defense to act as executive agent of the government for the conduct of these activities and to establish NSA as a separate agency to conduct these functions.

Apart from the assignment of these functions to NSA, the Congress had clearly recognized the legality of these activities - explicitly in 1950 when 18 U.S.C. 798 provided for specific criminal penalties for the unauthorized disclosure or prejudicial use of communications intelligence information. Subsequently, the Omnibus Crime Control and Safe Streets Act of 1968, through exception, recognized the constitutional power of the President to authorize electronic surveillance as he deems necessary to obtain foreign intelligence information deemed essential to U.S. security. More specifically, the Congress passed two laws directly related to NSA which provided that agency unusual authorities regarding employment and classification (P.L. 86-36 of 1959) and employment termination (P.L. 88-290) of 1964. While these statutes did not recognize NSA's assigned functions as such, the highly classified nature of its functions was the explicit motivating factor.

(3) National Programs (NRO) - The function of this program (satellite reconnaissance) and the existence of the NRO organization are officially classified; as a result, neither the function nor the organization has a specific statutory basis. The NRO was established as a separate Defense agency reporting to the Secretary of Defense by DOD-CIA agreement in 1965. The Secretary of Defense, of course, has broad authority under the National Security Act of 1947 (50 U.S.C. 402-3) and the Defense Reorganization Act of 1958 (10 U.S.C. 12) to control and reorganize Defense activities. These statutes also have provisions for reporting these actions to Congress for possible rejection by the Congress; given the classified nature of NRO activities, no formal reporting appears to have occurred.

(4) DIA - DIA was established in 1961 by direction of the Secretary of Defense under the reorganization authority granted by 10 U.S.C. 125. The Secretary's plan was reported to the Armed Services Committee as required by statute and DIA was subsequently established.

(5) FBI - There is no statute establishing the FBI. Under provision of 28 U.S.C. 533, the Attorney General may appoint officials "(1) to detect and prosecute crimes against the United States, (2) to assist in the protection of the President, and (3) to conduct such investigations regarding official matters under the control of the Department of Justice

and the Department of State as may be directed by the Attorney General." Other statutes, such as the Congressional Assassination, Kidnapping and Assault Act, vest in the Bureau special responsibilities, but its principal investigatory authorities appear to rest upon Executive Order and Presidential statements or directives placing these responsibilities under the authority of the Bureau.

(6) Service Cryptologic Agencies (SCAs)/Military Intelligence Agencies - The SCAs predated the establishment of NSA and now operate under the direction of NSA for their communications intercept missions. All were established by the Service Chief of Staff pursuant to the broad functions and duties assigned to the Services by statute. The various military intelligence agencies, which perform a wide variety of intelligence functions, also were established pursuant to broad Service responsibilities for defense of the United States.

B. Present State of the Law

(1) Statutory Basis: Except for the DCI/CIA, there is a notable absence of specific statutory basis for the organization of and functions performed by the Intelligence Community. Almost all are derivative of broad executive authorities entrusted in the President, the DCI, the Secretary of Defense, and the Military Services. In almost all cases, because of security concerns, these authorities have been exercised through classified directives and memoranda such that the public at large, the

Congress as a whole, and most elements of the executive branch are unaware of the organizational arrangements, the assignment of functions and duties, and nature of their activities. Nonetheless, a small group of senior Congressmen was privy to the basic organization and functions such that a semblance of budgetary appropriations process could be carried out.

It is clear that the Congress did not envision, either in the establishment of CIA or in any specific subsequent legislation, the large, complex, and expensive organizational and functional arrangement that has come to pass. More specifically, the development of CIA as a major element in intelligence collection and covert action operations - as it now is - does not appear to be consistent with existing statutes except by indirection. Similarly, the importance and growth of both communications intercept and satellite reconnaissance are reflected poorly or not at all in statute and have been treated so secretively that there is a substantial question that these organizations and functions are appropriately conducted except under a very broad interpretation of the executive branch's authorities and a very narrow construction of the Congress'

authorities to legislate and to control the pursestrings.

(2) Other Authorities: There appears to be ample authority derivative from the constitutional duties of the President and the statutory responsibilities of the DCI, the Secretary of Defense, other department heads, and the Services to provide for a reasonable basis for the current organizational and functional assignments. Most of the directives carrying out these duties and responsibilities are, however, classified; as a result, no compelling and searching legal test has been conducted that could provide a high confidence answer.

Clearly, the Congress - both by specific legislation and through the annual appropriations process - has recognized at least the major outlines of current Intelligence Community organizations and functions. NSA, DIA, FBI, the Service Cryptologic Agencies, and other military intelligence entities have been recognized - sometimes in statute, sometimes by specific or general appropriations action, and by other indications of congressional recognition (reports, investigations, testimony, etc.). Only the NRO is devoid of any specific congressional recognition.

The Congress as a whole, however, has taken very little explicit recognition of some of these activities, such that a reasonable argument can be made that the specific organizations with their functions, their funding, and their integration in the Intelligence Community has not been recognized by Congress in any identifiable fashion. While certainly some key members of Congress were familiar with these aspects of intelligence activities, no continuing and explicit recognition is provided by an objective reading of congressional activities.

(3) Limitations: With the exception of specific limitations on CIA's internal security role contained in the National Security Act, there are no statutory restrictions or limitations specifically applicable to the intelligence organizations and their functions. This largely is the result of the absence of specific legislation covering these organizations and their functions. While the intelligence agencies and their activities are, of course, subject to the provisions of other statutes, there appears to have been a concerted executive branch and congressional effort to avoid the enactment of laws

specifically applicable to intelligence, except to the extent that such laws would provide extraordinary authorities exempting them from provisions applicable to other agencies regarding the use of funds, reporting requirements, and other administrative conditions.

Thus, many of the extant statutes - the CIA Act of 1949, the Classification Act, the CIA Retirement Act, and the previously mentioned acts applicable to NSA, for example - provide for specific exemptions from otherwise standard administrative procedures. By interpretation and extension, these exemptions now serve to cover a wide variety of intelligence practices ranging from employment to operations. Perhaps, the most notable examples of these interpretative extensions are the subsequent GAO curtailment of audits of even CIA unvouchered funds and the informal agreements covering appropriation, expenditure, and audit of NRO funds. Thus, the limitations and restrictions placed on intelligence activities by other statutes tend to be undermined by the exemptions granted in some statutes.

Non-statutory limitations and restrictions are almost nonexistent except in the form of internal agency guidelines. The NSC intelligence directives, executive orders, and other directives rarely address limitations and restrictions specifically applicable to intelligence organizations and functions. As in the case of statutes, most provide for specific exemptions rather than enforcing specific limitations on these activities. One basic Executive Order (E.O. 11652) covering classification, for example, provides for a virtual blanket exemption for intelligence information from the general provisions of that order and for declassification. Whether merited or not, it serves as an example of the general exemptions provided the intelligence agencies by current directives.

III. Options for Dealing with Intelligence Charters and Limitations

The options available for dealing with the absence of statutory charters for intelligence organizations and functions and of limitations on their activities are heavily dependent on political and policy considerations as opposed to purely legal considerations. They are difficult and complex issues that require in-depth exploration.

A. Options for Charters/Functions

1. Statute providing basic outline of intelligence agencies' organization, functions, and activities.
2. Revised statute for CIA with or without specific statutes for, at least, NSA and NRO.
3. Specific, detailed statutes for all major elements - CIA, NSA, NRO, DIA, SCAs, FBI, and some Service entities.
4. Generic statute for basic functions and providing broad authority to President (or DCI or Secretary of Defense) to allocate functions subject to procedural approval.
5. Executive order(s), rather than statutes, covering any of the above alternatives.
6. Status quo.

B. Options for Limitations

1. Generic statute providing for broad limitations on foreign intelligence activities.
2. Specific statutes covering more sensitive aspects - electronic intercept, domestic activities, covert action, etc.
3. Executive order(s), rather than statutes, providing for limitations as above.
4. Repealing some or all of existing statutory and/or administrative exemptions.